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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 359

ROBERT MIMS, *Petitioner*

v.

UNITED STATES, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on June 9, 1964.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals, No. 7401, is not yet officially reported; it is reproduced herein as Appendix A.

JURISDICTION

The Court of Appeals judgment was entered on June 9, 1964. Mr. Justice White entered an order on July 13, 1964 granting petitioner's motion for extension of time within which to file a petition for certiorari to

August 8, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Was petitioner denied his Sixth Amendment right to a fair trial by the misconduct of the marshal and bailiff during jury deliberations? Did the failure of the trial judge to inquire into the facts surrounding such misconduct, and to hold a full hearing on such question, deprive petitioner of his right to Due Process of Law under the Fifth Amendment?

2. Did the trial court err in not ruling upon and granting petitioner's tacit demand for production of a Government agent's report, which report was concededly within the purview of the Jencks Act, 18 U.S.C. § 3500?

3. Did the indictment satisfy the Sixth Amendment requirement that the accused be informed of the nature of the charges against him?

4. Is 49 U.S.C. § 1472(j) unconstitutional in that it is so vague, general and uncertain that it violates the Due Process Clause of the Fifth Amendment?

STATUTE INVOLVED

The statutory provision involved is the 1961 amendment to § 902 of the Federal Aviation Act of 1958, 75 Stat. 466, 49 U.S.C. § 1472(j) which states, in pertinent part:

> "(j) Whoever, while aboard an aircraft in flight in air commerce assaults, intimidates, or threatens any flight crew member or flight attendant (including any steward or stewardess) of such aircraft, so as to interfere with the performance by such member or attendant of his duties, or lessen

the ability of such member or attendant to perform his duties, shall be fined not more than $10,000 or imprisoned not more than twenty years, or both. . . ."

STATEMENT OF THE CASE

Petitioner was indicted under 49 U.S.C. § 1472(j) and tried in the United States District Court for the Western District of Oklahoma. The District Court's jurisdiction was based upon 18 U.S.C. § 3231. He was convicted, fined $10,000 and sentenced to fifteen years.

On January 6, 1962, petitioner chartered a private four-seater, dual-controlled aircraft to fly him from Sioux City, Iowa to Dallas, Texas. He had flown from Sioux City to Dallas with the same charter company and the same pilot on December 21, 1961 (R51, 83)*. Petitioner sat in the right front seat behind a set of dual controls. Another employee of the charter company came along for the ride and sat in the rear seat.

In order to place the events which follow in perspective, it is necessary to note petitioner's physical condition at the time of the flight. His wife testified that petitioner was "drunk the whole time he was in Sioux City" (R91); the pilot, Schooley, testified that on January 3, 1962, Mims had chartered a flight to Dallas, but that when he went to pick him up at his hotel, he found petitioner to be "dead drunk," so the flight was cancelled (R51); Mrs. Mims testified that, on January 4, 1962, another employee of the same charter company had come to her mother's house in Sioux City to pick Mr. Mims up for a charter flight. He was

* R refers to the record abstract printed as appellant's appendix in the United States Court of Appeals for the Tenth Circuit, which appendix has been certified and filed with this petition as a part of the official record below.

passed out then and this flight, too, was cancelled (R51, 91); she testified further that she warned the charter company then that her husband was sick; that on January 6 the charter company called her and she told them then they should not fly Mims to Dallas under any circumstances (R92); Mims testified that on the day of the flight in question, he had been refused a seat on a Braniff Airlines flight just prior to coming to the charter company. He also testified that, after Braniff had turned him down, he consumed a pint of whiskey (R83); the pilot also had stated in an affidavit that during the flight petitioner's actions "were those of an irrational person, one who was 'crazy drunk' and did not know what he was doing" (R126); petitioner has in fact a serious history of alcoholism, a factor which figured significantly in the assessment of the excessive sentence by the trial court (R118-122).

After leaving Sioux City, the plane made a stop at Wichita, Kansas for refueling. While there, petitioner procured a fifth of vodka and two Seven-Ups. When the plane was aloft again, petitioner had the passenger fix him two drinks; he subsequently became ill and regurgitated (R54, 55).

A disagreement then developed between petitioner and the pilot over the proper compass heading for Dallas. Petitioner took over the controls briefly, attempting to set the plane on what he thought was the proper heading. The pilot brushed his hands away and maintained control of the plane (R44, 45). Petitioner had been a naval air ace in the second world war. He testified that on their previous flight together the same pilot allowed him to assume the controls for a brief period of time. The pilot denied this (R79, 48).

Thereafter, Mims became quiet and reclined in his seat, either napping or passed out (R56). He then

roused from his stupor, spit up again, and reached over and opened the door of the plane. There was considerable commotion in the cockpit over getting the door closed. The pilot decided to make an unscheduled stop at Stillwater, Oklahoma to close the door, since it is difficult to do such while the plane is in flight (R45, 46). Mims again lapsed into a stupor (R58).

When the plane got to within twenty feet of the runway, Mims again roused, only to see the ground rapidly coming up to meet him. About this time the pilot suddenly grabbed his head, evidently in great pain. He testified that he was suffering from a head cold and that the rapid descent caused him to have a severe earache. He had had two such attacks on previous occasions, one earlier in the present flight, and one during their previous flight together (R53, 59).

Petitioner, noting the pilot's condition and the runway approaching, reacted reflexively, as a trained, experienced pilot might predictably do, and grabbed the controls, pulling the plane up. Much confusion and commotion followed his action. The pilot told the passenger to let petitioner have it with a bottle, which command he followed, first by striking him in the head with a Seven-Up bottle, and then by pummeling him over the head with the nearly full vodka (fifth) bottle, using all the force he could muster in the limited swinging space. They were able to subdue petitioner in this manner (R47, 58, 59, 81).

After the pilot regained control of the plane, and when at an altitude of about four-hundred feet, Mims suddenly reached over, turned off the key, removed it from the ignition and placed it in his pocket. The pilot was forced to make a dead stick landing which he did, safely (R59).

REASONS FOR GRANTING THE WRIT

I

The Trial Court Erred in Not Undertaking an Investigation Into the Alleged Misconduct of the Marshal and Bailiff; the Failure of the Court to Take Affirmative Action Deprived Petitioner of Due Process of Law and Further Compounded the Harm Done by the Misconduct, Which of Itself Deprived Petitioner of a Fair Trial Guaranteed by the Sixth Amendment. This Court Should Redress These Prejudicial Errors by Reversal, Either on the Basis of the Deprivation of the Constitutional Rights, or on the Basis of the Court's Supervisory Power Over the Federal Court System.

The factual setting underlying the issue presented herein is as follows: petitioner's case went to the jury at 9:50 a.m. on April 9, 1963. During the noon recess (while at lunch) one of the jurors suffered a heart attack. The marshal and bailiff were fully informed of the juror's infirmity, as were the other jurors. However, instead of informing the court of the juror's serious disability, as they were bound by duty to do, they conducted the juror back to the jury room where he was given a thirty-minute period to recuperate.

Previous to the noon recess the incapacitated juror had, according to his own statement, informed his fellow jurors that he thought Mims innocent and that he would not sign a guilty verdict. At 2:35 p.m. of that same day the jury returned a guilty verdict, signed by all the jurors. The matter of the sickness was not then brought to the attention of the court or counsel, either by the marshal, the bailiff or by any of the jurors (R113).

On April 15, the day of sentencing, counsel for defendant was approached by the juror in question and informed of the events of April 9. He told him of his personal conviction that petitioner was not guilty

and that he only signed a guilty verdict in order to avoid a further heated argument that might be injurious to his health, and possibly even kill him. Defense counsel brought this to the court's attention that same day in open chambers with both counsel present. The judge summarily dismissed the incident, without inquiry of the marshal, the bailiff or the juror, with a "well, you have made your record" (R113). It appears further that during the sentencing proceeding, petitioner Mims brought the court's attention to the presence in the court room of the juror in question. The judge simply invoked the "no impeachment of a juror's verdict" rubric and dismissed the incident again (R117).

Petitioner respectfully submits that he was denied due process and a fair trial in the following respects. Having learned of the fact of the illness of the juror, and the failure of the officers of the court to report it, the trial court was under an affirmative duty to conduct an investigation into these occurrences, causing the marshal, the bailiff and the juror to be interrogated, in a recorded proceeding, and in the presence of counsel. Under the circumstances, nothing less would satisfy the requirements of due process. Further, without a full ventilation of the question of the illness of the juror, the effect such illness had upon his freedom of choice, and a resolution of all the other issues which might have developed at a hearing, it cannot be said that petitioner had a fair trial.

While there is an understandable lack of precedent on the precise question here presented, *i.e.*, the duty of the trial court to hold a full hearing where the misconduct of the marshal is brought to its attention *after* the close of the trial, there is precedent on the question of

misconduct *during* trial, holding that a duty devolves upon the trial court to hold a full hearing where the alleged misconduct casts suspicion upon the fairness of the trial.

In *Wheaton* v. *United States,* 133 F. 2d 522 (8th Cir. 1943) where the trial court failed to hold a hearing on appellant's motion, alleging misconduct of the bailiff in explaining to the deliberating jury the different counts in the indictment, the Court of Appeals reversed, directing the judge to "rehear the appellant's motion, and, after a rehearing, to determine whether a new trial should be granted . . ." *Id.* at 527.

This Court held, as long ago as 1892 in *Mattox* v. *United States,* 146 U.S. 140, that the misconduct of the bailiff in reading a newspaper article, prejudicial to the defendant, to the deliberating jury constituted reversible error. While the Court did not consider the question of the necessity of a hearing, it is apparent that had the lower court held such a hearing, the necessity for considerable subsequent litigation could have been obviated and the problem resolved in its inception.

A particularly helpful analogy regarding the duty of the trial court in a situation closely related to that under consideration can be found in the procedure utilized where, during the course of the trial, facts casting doubt upon a juror's impartiality come to light. In considering a question of this nature, the Second Circuit held that the procedure adopted by the trial court in conducting a full, reported investigation, under oath and with counsel present and allowed to examine all participants, was the approved manner of dealing with such questions. *United States* v. *Flynn,* 216 F.2d 354, 368 (2d Cir. 1954). See also, *Ryan* v. *United States,* 191 F. 2d 779 (D.C. Cir. 1951) where the

Court of Appeals applauded the action of the trial judge in conducting a careful hearing, under circumstances similar to those present in *Flynn*.

Petitioner respectfully submits that this Court should recognize a like duty in the trial court where the occurrence comes to light *after* the trial, but under circumstances, as present here, where the court can ascertain the truth of the matter with little inconvenience to itself or the parties involved. The fairness of petitioner's trial having been put in question by the revelation of the misconduct of the marshal and bailiff, and doubt cast upon the integrity of the verdict because of the juror's serious illness, due process would seem to demand that the court do something more than cavalierly report that "you have made your record."

Before leaving this question, it should be noted that both the trial court and the Court of Appeals ultimately dismissed this problem by taking refuge in the "no impeachment" rule. Petitioner submits that they both misconceived the issue. The question of impeachment, if there is in fact such a question present here, is ancillary to the misconduct and duty of the court issues. This is not a case of a matter within the personal consciousness of one juror or even of the jury panel itself; it is one of proper conduct of the jury proceedings. The circumstance which was sought to be demonstrated was extrinsic to the verdict itself. The sage pronouncement of Judge Learned Hand that,

> judges again and again repeat the consecrated rubric [jurors may not impeach their verdicts] which has confused the subject; it offers an easy escape from embarrassing choices . . . *Jorgensen v. York Ice Machinery Corp.*, 160 F. 2d 432 (2d. Cir. 1947), *cert. den.* 332 U.S. 764.

seems apropos the present situation. By centering their attention on the supposedly non-assailable impeachment of the juror's verdict question, the lower courts failed to meet the antecedent and crucial questions of the duty of the marshal and bailiff, and the failure of the trial court to take action. In so doing they may have avoided "embarrassing choices," but they also all but obscured petitioner's valid constitutional inquiries.

II

There is a Serious Conflict Between the Tenth Circuit and the District of Columbia Circuit on the Question of What Constitutes a Demand for a Statement Concededly Within the Purview of the Jencks Act, Which This Court Should Resolve on the Basis of its Supervisory Power Over the Federal Court System.

Petitioner's second point urged for reversal relates to the trial court's failure to recognize and pass upon defense counsel's (admittedly unorthodox) demand for production of statements under the Jencks Act. The colloquy giving rise to this assignment is as follows:

> Q. (Mr. Burger, Mims' counsel) But you do say the Government has a copy of that report?
>
> A. (F.B.I. Agent) As far as I know.
>
> Q. Do you have any objection—
>
> Mr. Parr: (Government's Counsel) (interposing) If the court please, I don't know what he is driving at. No question but we have a copy of the report. It's the only way I would know anything about the case.
>
> Q. (By Mr. Burger) Do you have any objection, Mr Drain (F.B.I. Agent) to my seeing the report?
>
> Mr. Parr: May it please the court, I object to that question. It is entirely incompetent, irrelevant and immaterial. Counsel knows that under Title 18, United States Code, Section 3500, he is entitled to a copy of a statement after a witness

testifies, the statement of the witness, but no statement has been taken in this case from this witness.

The Witness: Only the pertinent things to this case were recorded. The entire conversation wasn't recorded.

Q. (Mr. Burger) Do you have any objection to my seeing the pertinent things to this case?

Mr. Parr: May it please the court, I object to that question. That's improper cross examination (R74, 75).

Although it is apparent that there was confusion in the court room among all involved as to whether this report was producible under the Jencks Act, it is manifest from our vantage point of time that it was indeed producible under subsection (e)(1) as a signed written statement of the witness (agent). *Clancy* v. *United States,* 365 U.S. 312; *United States* v. *McCarthy,* 301 F. 2d 796 (3d Cir. 1962). The trial judge did not rule on the objection of Government counsel, nor did he inquire of defense counsel whether he was in fact making a demand. The Court of Appeals held that he had no duty to do so, absent some form of request (7a).

On the basis of the decision of the Court of Appeals for the District of Columbia in *Howard* v. *United States,* 108 U.S. App. D.C. 38, 278 F. 2d 872 (1960) on a like "demand" issue, it is apparent that there is a serious conflict between that court and the Tenth Circuit on this issue. In *Howard,* the question of demand stemmed from the following trial discussion:

Q. (By defense attorney) But you do have the statement and it is home. Is that correct?

A. (Officer) That is correct.

Q. May I see it?

(Assistant U.S. Attorney) He is not entitled to

look at this police report, your honor. I object to it. He knows better.

The Court: Sustained. *Id.* at 40 n. 6, 278 F. 2d at 874, n. 6.

The court held that,

> This contention [that there was no demand] is conclusively refuted by the record which clearly shows that *no ritual of words could make it any plainer that the defense wanted to see the officer's report.* *Id.* at 40, 278 F. 2d at 874. (Emphasis added.)

The only difference between the two cases is the fact that in *Howard* the court took action on the Government's objection and sustained it. Here, the court remained silent, even in the face of the objection by Government counsel. Certainly, if the statement of counsel in *Howard* was sufficient to constitute a demand, the tacit demand of petitioner's counsel in the instant case was sufficient to satisfy the requirements of the Act.

Even though petitioner maintains that his demand was sufficient in and of itself, there appears a further basis for substantiating his position, which was not present in *Howard.* In the instant case, petitioner had advised the court of his intention to invoke the protection of the Act as early as the pre-trial stage, when he made a motion for production of all Jencks Act statements *twenty-four hours before* the Government agent was to testify. In making his motion, petitioner clearly made a *demand* for the production of the statements, even if he had no authority to substantiate his right to have them in advance of the witness' testimony. Neither Government counsel nor the trial court questioned petitioner's right to make a demand at that time, but rather simply

pointed out that he was not entitled to their production until after the witness testified. Petitioner's counsel freely admitted he was aware of the fact that, under the law he had no right to the statements until after the witness testified, but noted that he was making the motion "to comply with the Jencks Act." The trial court made no ruling on the motion, but stated that,

> The court will give you ample time to read the statements. We will take a recess if it comes to that point, and you will have time to read it over (R28).

It is necessary to set forth the above in order to appreciate how fully apprised the trial judge was of petitioner's counsel's intention to procure the witness' report at trial. Not only did the court fail to rule on petitioner's tacit demand and the Government's objections, but it also failed to take action on its own deferred and still outstanding ruling on petitioner's pre-trial demand.

It should be noted that petitioner *had different counsel* at trial than during this pre-trial stage. Admittedly his counsel at trial would have obviated the problem here presented by a forthright demand at the proper moment. But, counsel for petitioner, unschooled in the subtleties of what is or is not a Jencks' report, was misled by the Government counsel's assertion that the report was not within the purview of the Act. While petitioner was certainly not bound by the Government's unilateral determination of what documents are producible under Jencks, his confusion and failure to make an explicit verbal demand is certainly understandable under such circumstances.

Production of this report was extremely important to petitioner's case. There were inconsistencies between the statements of the two Government agents, who had testified concerning what petitioner had said when they made their investigation (R100, 101). Further, petitioner's own testimony as to what he discussed with the agents stands in direct contradiction to their testimony (R82). When, as here, the Government's case rests upon the testimony of only one eye-witness (Swindler, the passenger, did not testify), the Government agent's testimony becomes especially crucial to petitioner's cause. Under such circumstances, petitioner should not have been denied his rightful opportunity to inspect the agent's report.

As this Court noted, in another setting, in the first *Campbell* decision, *Campbell* v. *United States*, 365 U.S. 85,

> [the statute] . . . implies the duty in the trial judge affirmatively to administer the statute in such a way as can best secure relevant and available evidence necessary to decide between the directly opposed interests protected by the statute— . . . *Id.* at 95.

This Court should recognize a duty in the trial court in circumstances such as are present here, to act as something more than a disinterested on-looker. The precise limits of the duty of the trial court need authoritative clarification by this Court. In view of the difficulties already facing defense counsel under the Act, the line should be drawn for greater liberality, in favor of the accused. The words of the Second Circuit are especially instructive on this point. After reciting

a litany of the problems confronting defense counsel in invoking the protection of the Act, the court stated that,

> To these impediments to an effective invocation of Jencks Act rights by defendants in criminal cases the Government would now add the niceties of ancient common law pleading in the formulation of demands for producible statements. Of course, the Act does not require that demands for statements must be of precise nicety, *and we are unwilling to hold that such requests be couched in formal or technical language. Aviles* v. *United States,* 315 F. 2d 186, 190 (2d Cir. 1963), *vacated sub nom* on other grounds, *Genovese* v. *United States,* 84 Sup. Ct. 24 (1963). (Emphasis added.)

III

This Court Should Grant Certiorari Because of the Deprivation of Petitioner's Sixth Amendment Right to be Informed of the Nature of the Charges Against Him, and in Order That it Might, on the Basis of its Supervisory Powers, Resolve the Confusion Among the Circuits on What Constitutes a Sufficient Indictment Where the Statute is Written in Generic Language, Where the Indictment Follows the Language of the Statute, and Where the Species of the Generic Act Is Not an Essential Element of the Offense.

Subsection (j) of Title 49 U.S.C. § 1472 proscribes in generic terms; specifically it speaks in terms of "assaults, intimidates, or threatens." It is evidently the intent of Congress that all species of assaults, intimidations, or threats occurring in flight which interfere with the performance by the flight crew member or flight attendant of his duties, or which lessen his ability to perform his duties, should be culpable under the Act.

Generally, as the Court of Appeals correctly noted, when a statute uses generic terms to define the offense,

the indictment based thereon must descend to particularize the species of the generic terminology. But, the court noted, where, as here, the species of assault, threat or intimidation is *not* an essential element of the offense, the government is not required to particularize in order for the indictment to be sufficient (2a, 3a).

However, where the indictment follows the generic statutory language, even though the species of the act is not an essential element of the offense, the indictment is still not sufficient, *unless* it apprises the defendant "with reasonable certainty, of the nature of the accusation against him . . . ." *United States* v. *Simmons*, 96 U.S. 360, 362. Petitioner respectfully submits that this indictment does not meet the test of "reasonable certainty" set out in *Simmons*, and that the lower courts erred in not dismissing it for insufficiency.

The vice in this indictment lies in the fact that a person who stands indicted under it has little more information than the words of the statute to inform him of the charges against him, or upon which to base the preparation of his defense (See Indictment, R3).

> In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature of and cause of the accusation.' *United States* v. *Cruikshank*, 92 U.S. 542, 557.

This Court ruled long ago that,

> In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, *unless those words of themselves fully, directly, and expressly without any uncertainty or ambiguity*, set forth all the elements necessary to constitute the offense intended to be punished; . . .

United States v. Carll, 105 U.S. 611, 612. (Emphasis added.)

Petitioner submits that the cryptically worded indictment returned against him does not meet this test. While the words of the indictment may set forth all the elements necessary to constitute the offense they do not "fully, directly, and expressly without any uncertainty or ambiguity," inform petitioner of the nature of the accusation against him. Petitioner reiterated throughout his testimony that he could not remember, due to his drunken condition, much of what had transpired; the pilot stated in his affidavit that during the flight petitioner was "crazy drunk" (R126). As broadly as the statute itself is worded, any number of words spoken or actions taken during the course of the flight might possibly be considered violations of the Act. With little personal knowledge of what had occurred, and with the utter paucity of information set forth in the indictment, how was petitioner to know what specific offense he was charged with, or how was he to adequately prepare a defense?

The trial court's answer in dismissing petitioner's motion for a bill of particulars that his attorney could "find out without much trouble from [his] client . . . what he did . . ." (R23) is no answer at all; in fact, it does violence to, and makes a mockery of, the historic principle in our criminal jurisprudence of the presumption of innocence. As this Court has repeatedly reiterated, ours is an accusatorial system of law, not an inquisitorial one, and especially not a "self-inquisitorial" one. Certainly the high principles of justice and fairness upon which our Constitution rests are not fulfilled if the Government can accuse an individual of

a crime in broad general terms and then tell him to look in his own heart and know why he stands accused.

In attempting to resolve the problem of how the accused is to be informed of the charge against him under this statute, the Court of Appeals stated that, although,

> we do not think it requisite to the validity of this indictment that the Government specify the particular overt acts employed to consummate the offense. . . . It may be that the accused is entitled to a specification of the manner or means by which the assault, intimidation, or threat were inflicted . . . (3a).

While this specification would ordinarily be supplied by a bill of particulars, the court noted that the denial of petitioner's motion to this effect was proper since he was in possession of an affidavit of the pilot, which made him "as well informed of the essential facts of the case against him as the Government" (4a). However, petitioner submits that the test is *not* whether the accused is as well informed as the Government; the test is whether or not the indictment is sufficient in law, and the indictment returned against petitioner standing on its own merits does not meet this test. Further, it is a well settled rule of law that a bill of particulars cannot save an invalid indictment. *Russell* v. *United States*, 369 U.S. 749, 770.

Even if an affidavit could in some manner fill the void created by an insufficient indictment, the affidavit in question here would certainly not add anything since its language stands in direct contradiction to that in the indictment! In the words of the affiant,

> At no time did Mims touch me. He did not threaten me, nor did he attempt physical contact with me or to force me to do anything.
>
> . . .
>
> He did not touch me or assault me . . . [he] did not threaten me with harm or in any other way (R126).

Petitioner was thus forced to go to trial without any real understanding of the nature of the Government charges against him, in contravention of his constitutional rights.

IV

This Court Should Cause the Writ to Issue Because of the Serious Question of the Constitutionality of 49 U.S.C. § 1472(j), and Because the Case Raises Important Questions of Federal Law Which Have Not Been, but Should be, Passed Upon and Settled by This Court.

It is not difficult to understand why the lower courts had so much trouble with the indictment in this case. It is for the simple reason that the statute is drawn in such a broad, general and vague manner that any sort of activity occurring in an airplane above the ground which (however remotely) smacks of an assault, intimidation, or threat, and which (however, innocuously) interferes with the conduct of the airplane, could be prosecuted and perhaps support a conviction up to twenty years in prison and a fine of $10,000.

Petitioner respectfully submits that there is serious question as to the constitutionality of 49 U.S.C. § 1472-(j). The subsection creates a new offense in our criminal jurisprudence; as this Court noted in *Connally* v. *General Constr. Co.*,

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. 269 U.S. 385, 391.

This Court has never passed upon the constitutionality of this subsection; indeed, it has never considered subsection (j) at all. It is apparent from the problems that the lower courts have had in interpreting and applying this statute, and from the plight of the petitioner himself, that the language needs authoritative interpretation. It is only through a full briefing and argument before this Court that these questions can be answered. The dividing line between what is lawful and unlawful may not be left to conjecture. *United States* v. *Capital Traction Co.*, 34 App. D.C. 592 (1910).

Finally, there is serious question whether Congress did in fact intend the proscriptions of subsection (j) to apply to private aircraft, and therefore to the actions of petitioner in the circumstances of this case. Although the Court of Appeals held, by a parity of reasoning from this Court's decision in *United States* v. *Healy*, 376 U.S. 75 that private aircraft were intended to fall within the purview of subsection (j), an analysis of the full legislative history will indicate that Congress did not consider private aircraft in anything but a "hijacking" context.

This Court correctly noted in *Healy* that the legislative history indicates that Congress intended the provisions of the Act to apply to all aircraft in commerce in a *hijacking* situation. Congress was concerned principally with the question of hijacking, which was the emotional stimulus to the legislation itself. It never considered the possibilities of the broad proscriptions of subsection (j) outside of a hijacking context.

However, by focusing attention on the hijacking issue, Congress failed to consider at all the problem of how the general language of subsection (j) might apply to the whole spectrum of aviation activities. Instead of including the proscription found in subsection (j) within the hijacking subsection (1472(i)) as the legislative history indicates was the intent of Congress, the drafters set it apart as an independent subsection, thus altering the emphasis from hijacking to *any* in-flight conduct. However, in so doing they failed to set out guidelines or standards to indicate just how far the proscriptions were intended to go. The legislative history provides no assistance, since it only shows Congress' concern with the hijacking problem. The language of subsection (j) itself is of no assistance, since it speaks in broad and general terms and, if anything, demonstrates that it was not intended to apply to private aircraft.

Further, if the subsection does in fact apply to private aircraft under all circumstances, the problems regarding due process enunciated, *supra*, are compounded, since the subsection does not take into consideration the manifestly different problems which may arise peculiar to the different modes of air travel. Is the subsection to be applied across the board in

the same manner to large commercial carriers, small charter flights, business flights in a company plane, private pleasure craft, etc.? If it is, what possible standard appears in the subsection which could reasonably be applied to all the divergent eventualities which might develop?

The subsection says nothing of intent; it does not define "interferes with," or "lessens the duties." Without burdening this Court with any more of the plethora of such questions which necessarily must arise upon consideration of the subsection, suffice it to say that Congress has simply failed to define the offense with sufficient precision, and has not set forth an ascertainable standard of guilt. Congress has cast its net too wide; the subsection is constitutionally deficient and justice demands this Court take curative action.

CONCLUSION

Petitioner comes before this Court having been accused of conduct not intended by Congress to be proscribed under the Act, indicted under an insufficient indictment, tried in a proceeding marked by denial of both substantive and procedural rights guaranteed to him by the Constitution, and convicted under a subsection of doubtful constitutionality. He faces imprisonment for fifteen years, not necessarily because of the culpability of his actions, but because he is sick and the trial court thinks that a long stint in prison will "rehabilitate" him and help "get the whiskey out of his system" (R122). *Cf. Robinson* v. *California*, 370 U.S. 660.

Now only this Court can begin to redress the errors that have gone before; your petitioner respectfully prays that this Court do so by causing the writ to issue.

Respectfully submitted,

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